

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 31761

STATE OF IDAHO,	)	2006 Opinion No. 22
	)	
Plaintiff-Appellant,	)	Filed: April 5, 2006
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
CESIA ANN ZUEGER,	)	
	)	
Defendant-Respondent.	)	
	)	

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Appeal from the District Court of the Third Judicial District, State of Idaho, Payette County. Hon. Stephen W. Drescher, District Judge.

Order of the district court suppressing evidence, affirmed.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for appellant. Kenneth K. Jorgensen argued.

Nevin, Benjamin & McKay, LLP, Boise, for respondent. Dennis Benjamin argued.

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WALTERS, Judge Pro Tem

The state appeals from the district court's order suppressing evidence obtained during the execution of a warrant for the search of Cesia Ann Zueger's home. We affirm.

I.

**FACTUAL AND PROCEDURAL SUMMARY**

A Fruitland police officer applied to the magistrate for a telephonic search warrant for a search of Zueger's home based on information provided by confidential informants. The magistrate authorized the search but did not personally sign the search warrant. Rather, the prosecutor signed the warrant at the direction of the magistrate. The warrant was executed and evidence was seized. Zueger was charged with grand theft and possession of methamphetamine as a result of the search.

Zueger moved to suppress the evidence obtained during the search of her home. Among the grounds for her motion, Zueger argued that the search warrant was invalid because neither

the magistrate nor a peace officer signed it, as required by I.C. § 19-4406, which provides: “If the affidavit for the warrant is related to the court telephonically, the magistrate may verbally authorize a peace officer to sign the magistrate’s name on a duplicate original warrant, which verbal authorization shall be recorded and transcribed.”

At the hearing on the motion to suppress, the state asserted that the prosecutor is a peace officer and therefore could sign the warrant on the magistrate’s behalf. The district court granted the motion to suppress, stating that law enforcement must strictly comply with Idaho statutes when invading an individual’s home and that neither the Idaho Code nor Idaho case law defines the prosecuting attorney as a peace officer.

The state filed a motion to reconsider, arguing that the fact that the magistrate directed the prosecuting attorney and not a peace officer to sign her name on the search warrant is a procedural issue that does not affect the substantive rights of the defendant. The state withdrew this motion before it was considered by the district court. Instead, the state filed the instant appeal.

## II. ANALYSIS

The state argues on appeal that the district court erred in granting the motion to suppress. In the trial court, the state argued that a prosecuting attorney is a peace officer and it therefore was permissible under I.C. § 19-4406 for the magistrate to direct the prosecutor to sign the search warrant on the magistrate’s behalf. The state abandoned this argument on appeal during oral argument.<sup>1</sup> The state’s remaining argument is that a warrant is valid if signed by any person at the direction of the magistrate under the Idaho Supreme Court’s interpretation of I.C. § 19-4406 in *State v. Fees*, 140 Idaho 81, 90 P.3d 306 (2004). When a decision on a motion to suppress is challenged, we accept the trial court’s findings of fact which are supported by substantial evidence, but we freely review the application of constitutional principles to the facts as found. *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). The district court’s findings of fact are not at issue.

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<sup>1</sup> At oral argument, the state raised an additional issue of whether suppression is the correct remedy. The state did not, however, include this issue in its briefs. We therefore will not address this issue on appeal. I.A.R. 35(a)(4).

Zueger contends that the state did not raise the issue regarding the signature on the search warrant that it now raises on appeal. Generally, issues not raised below may not be considered for the first time on appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). Regardless of whether the state raised this issue below, we find the state's argument to be without merit.

In *Fees*, the Supreme Court addressed the question of whether a search warrant was valid under I.C. § 19-4406 where the magistrate directed an officer to sign the original search warrant on his behalf but failed to execute a duplicate as required by the statute.<sup>2</sup> The Court concluded that the lack of a duplicate copy of an original warrant did not render the original warrant invalid. *Fees*, at 85, 90 P.3d at 310. The Court held that the signature on the warrant, placed there by the officer at the magistrate's request, "had the same validity as if the magistrate had personally signed his own name" and the original warrant was therefore a validly-issued warrant. *Id.* This determination was based in part upon the Black's Law Dictionary definition of "signature," which included a person's name written by that person or at the person's direction. *Id.* The state now asserts that the Court's reliance on this definition supports its argument that a search warrant is valid if signed by *any person*, including the prosecuting attorney, at the magistrate's direction.

The state's reliance on *Fees*, however, is misplaced. The question in *Fees* was not whether a prosecuting attorney or anyone other than a peace officer may promptly sign a search warrant at the behest of the magistrate. Rather, the challenge in *Fees* was the lack of a duplicate original of the warrant and whether this constituted a failure to issue the warrant. The Court was addressing a factual situation that involved a police officer subscribing the magistrate's signature to a warrant.

Furthermore, were we to adopt the state's argument without limitation, a search warrant would be valid if signed by any person at the magistrate's direction. The state's argument rests on the Idaho Supreme Court's use of the definition of signature. According to the state, because a signature includes a person's direction to another to write his signature, the magistrate could direct any available person to sign his name to a search warrant. There would be no limit to who would be able to sign a warrant upon direction by a magistrate under the rule the state urges us to

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<sup>2</sup> Similarly, the magistrate in this case failed to execute a duplicate original warrant.

adopt. This argument disregards the statutory requirement that the person physically signing the warrant at the direction of the magistrate be a peace officer. We conclude that the Court did not intend to extend the statutory authority to sign a warrant at the magistrate's direction to any available person by its ruling in *Fees*. The district court therefore did not err in granting Zueger's motion to suppress.

### **III.**

#### **CONCLUSION**

For the reasons stated above, we affirm the district court's order suppressing evidence obtained during the search of Zueger's home.

Judge LANSING and Judge GUTIERREZ **CONCUR**.